IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error,

vs.

OTTO DANIEL,
Defendant in Error.

No. 2075

Error to the District Court for the District of Alaska, Second Division.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS AND REPLY BRIEF ON THE MERITS.

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THE PURPORTED JUDGMENT DOCKET.

Attention is directed to the purported judgment docket, of which a certified copy is relied on by defendant in error to show satisfaction of the judgment below, containing no entry of the issuing of the writ of error herein, or of the appeal, or when

taken, in the manner required by section 532 of the Alaska Code of Civil Procedure, which reads:

"The judgment docket is a book wherein the judgments are docketed, as elsewhere provided in this code. Each page thereof shall be divided into eight columns, and headed as follows: Judgment debtors; Judgment creditors; Amount of judgment; Date of entry in journal; When docketed; *Appeal, when taken;* Decision on appeal; Satisfaction, when entered."

Failing on its face to comply with the provisions of the statute, it would seem that the instrument in question is not entitled to admission in evidence as a judgment docket, nor for any purpose for which it is sought to be used as such, and that it ought not to be so received or considered.

STATEMENT.

The judgment was paid and satisfied through the mistake of a third party. The payment was not made by the defendant, or at his request, or with his authority, or even with his knowledge or consent; and he has filed a motion in the cause below to have the money returned to the corporation that paid it (Afft. D. Hoogendorn). The instructions given by the president of that corporation, which is not a party to this writ, seem either to

have been misunderstood or erroneously communicated by telegraph, and it has brought an action against defendant in error to recover the money back (Afft. Walter W. Johnson).

ARGUMENT.

Money paid through mistake of facts can always be recovered back. Even the cases holding that an appeal will be dismissed after payment of the judgment by the defendant do not apply here, for in this case there has been no payment, voluntary or otherwise, by the defendant. Although Daniel received the money without fault on his part, he has no more right to retain it, after demand for repayment, than if he had stolen it; and he cannot make his wrongful retention of the money the basis of his motion to dismiss.

The cases in the Supreme Court of the United States are readily distinguishable. Where it is made apparent that the *dominus litis* rests in one party, or that the *successful* party below has been paid the judgment in full, that party cannot maintain the writ. But where the judgment is paid or performed by the *unsuccessful* party below, whether

prior to or after execution issued, or prior to or after the writ is sued out, he may nevertheless maintain the writ if it be sued out within the period allowed by law; and in case of reversal, he is entitled to be restored to his former rights.

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money."

County of Dakota vs. Glidden, 113 U. S. 222 (28 L. Ed. 982).

In *Erwin vs. Lowry,* after judgment below, certain moneys ordered paid to the unsuccessful party were deposited with the sheriff prior to writ of error. A motion to dismiss was denied in the following language:

"Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; *yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree.* If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights."

Erwin vs. Lowry, 7 Howard 172; 12 Law Ed. 655.

Also see Note 33 L. Ed. U. S. Reports, 1016, citing cases where money paid by mistake can be recovered back.

"It is said that after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal. The principle is unsound."

O'Hara vs. McConnell, 93 U. S. (3 Otto 150); 23 Law. Ed. 841.

Several cases decided by the Supreme Court, dismissing appeal after payment of debt or judgment, are on the theory that the facts showed a voluntary settlement of the litigation, and that no real controversy longer existed between the parties.

Little vs. Bowers, 134 U. S. 547 (33 L. Ed. 1016);

San Mateo Co. vs. S. P. R. Co., 116 U. S. 138 (29 L. Ed. 589);

Thorp vs. Bonnifield, 177 U. S. 15 (44 L. Ed. 652).

"Although there is undoubtedly a conflict in the cases, the doctrine supported by the *great weight of authority* is that a judgment defendant does not waive the right to appeal and to reverse the judgment for error, by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made voluntarily or after execution has issued and been served upon him."

45 American State Reports, 272, *note* and cases cited.

"The general doctrine of the cases seems to be that, in the absence of any statute on the subject, the party against whom an entirely adverse judgment is rendered does not lose his right of appeal by paying the amount of the judgment, either before or after taking his appeal, since this is no more than the judgment-creditor could compel him to do if no stay of execution were awarded (citing cases). And compliance with a decree in equity does not deprive the party against whom it is rendered of his right to appeal (citing cases). * * * So where a bill for specific performance was dismissed, but the cause was retained for the purpose of making compensation on condition that the complainant would bring in the contract to be canceled, it was held that the complainant would not lose his right of appeal even by bringing in the agreement and filing it without protest. *River vs. Gray,* 10 Md. 282."

13 American Decisions, 546, *note* and cases cited.

The Court of Appeals of New York has very fully considered the subject in a case where a judgment of the Special Term of Common Pleas was affirmed by the General Term of that court, the judgment paid, and an appeal thereupon taken to the highest court of the state. The judgment was satisfied of record even before service of the notice of appeal. The defendant paid the judgment voluntarily, no process having been issued or proceedings taken to enforce payment thereof.

"The defendant's practice in paying the judgment before appealing from it is not to be con-

demned. It is rather to be encouraged. * * * * * We think he should not, by a temporary submission to the decision of the court, be placed in a worse position than if he awaited execution and settled it with sheriff's fees (citing cases). To the same effect are many subsequent decisions, and it must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal."

Hayes vs. Nourse, 107 N. Y. 577; 1 Am. St. Rep. 89; 14 N. E. 508.

The Chief Justice of the Supreme Court of Illinois, in *Richeson vs. Ryan,* 14 Ill. 741; 56 Am. Dec. 193, entertained the same opinion:

"The judgment fixed the liability of Richeson, and he could only avoid payment by procuring its reversal. He was not bound to wait until payment should be demanded by the sheriff. He was at liberty to pay off the judgment at once and thereby prevent the accumulation of interest and costs. By so doing he did not waive his right to remove the record into this court for the purpose of having the validity of the proceedings tested and determined."

The following authorities also hold that the payment or satisfaction of a judgment is no bar to an appeal or writ of error thereon for its reversal.

Burrows vs. Mickle, 22 Fla. 572; 1 Am. St. Rep. 217;

County Commissioners vs. Johnson, 21 Fla. 577;

Armes vs. Chappell, 28 Ind. 469;

Dickensheets vs. Kaufman, 29 Ind. 154;

Hill vs. Starkweather, 30 Ind. 434;

Belton vs. Smith, 45 Ind. 291;

Kling vs. Sejour, 4 La. An. 128;

Watson vs. Kane, 30 Mich. 61;

Barthelemy vs. People, 2 Hill 248;

Perry vs. Woodbury (Com. Pl.), 17 N. Y. 530;

Edwards vs. Perkins, 7 Ore. 149;

Eilers vs. Pick (Ore.), 113 Pac. 54;

Chapman vs. Sulton, 68 Wis. 657; 32 N. W. 683.

It is well settled that a court will refuse to consider moot questions. Some of the authorities cited by defendant in error are of this class; in others, the right to vote at elections already held and to recover taxes paid after decree below, was in controversy, and there was nothing left for the decree to operate upon. Counsel seem to have found no cases in point, where the payment of an ordinary money judgment, such as that in controversy here, has prevented the *unsuccessful* party below from maintaining the writ. We shall briefly consider the authori-

ties cited, in the order in which they appear in the brief of defendant in error.

Morton vs. Superior Court, 65 Cal. 496 (4 Pac. 489), fine for contempt for disobeying order of injunction, in which the fine was paid.

People vs. Burns (Cal.), 21 Pac. 540, dismissed on stipulation of payment, with leave to appellant to make further showing for reinstatement of appeal before going down of the remititur.

Hughes vs. Streeter, 24 Ill. 650, is not in point, being on motion to vacate satisfaction of judgment.

Mills vs. Green, 159 U. S. 651, was to secure the right to vote at an election for delegates to a constitutional convention. Before the appeal was taken, the date of the election had passed.

Jones vs. Montague, 194 U. S. 147, writ of prohibition to prevent canvass of votes cast at a congressional election after the canvass had been made.

Little vs. Bowers, supra, for taxes which were paid after the writ issued.

Singer Mfg. Co. vs. Wright, 141 U. S. 696, to enjoin the collection of a tax which was paid after the decree below.

Richardson vs. McChesney, 218 U. S. 487, a moot case in which the election affected by the decree was held a long time before, and both the persons elected and their successors in office had been admitted to seats.

Tomboy G. M. Co. vs. Brown, 74 Fed. 12, to set aside tax sale and enjoin making a tax deed. Pending appeal, the tax was paid.

In *Tinker vs. McLaughlin* (Okl.) 119 Pac. 239, the motion to dismiss was not resisted.

In *Whyel vs. C. & C. Co.* (W. Va.), 69 S. E. 192, it developed that a moot question only was left of the controversy.

In *Duryea vs. Fueschsel* (N. Y.), 40 N. E. 204, the judgment appealed from was subsequently vacated.

The motion to dismiss should be denied.

REPLY BRIEF OF PLAINTIFF IN ERROR ON THE MERITS.

Unrecoverable Damages.

It is not contended in the brief of defendant in error that any of the damages claimed (1) for loss of time and expense in going from Portland to Alaska and returning to the States in the fall of 1907, in the sum of $1,500; (2) for the failure to secure employment during the winter of 1907-1908, in the sum of $1,500; and (3) for the loss of time and expenses during the pendency of the suit for specific performance and the appeal, in the sum of $1,000, are recoverable; but the errors committed in refusing to strike these items from the complaint, in overruling the objections to the testimony offered thereunder, in denying the motion to strike the testimony admitted, and in instructing the jury upon the evidence thus improperly introduced, are sought to be excused on the ground that the court below cured any prejudice by requiring the defendant in error to remit a certain amount from the verdict.

The fact that the defendant in error introduced no evidence at the trial even tending to show what he had expended under item (1) *supra* is unquali-

fiedly admitted; but it is said that the court did not instruct the jury that defendant in error was entitled to recover such expenses. If there was no such evidence, it was the duty of the court to instruct the jury to disregard the claim for expenses, and the omission to do so constitutes error prejudicial to the rights of plaintiff in error. The jury had the pleadings with them during their deliberations (Tr. 44), and were undoubtedly influenced in fixing the amount of their verdict by the allegation in the complaint which the court had refused to strike.

Nor does the record disclose that the amount remitted from the verdict by defendant in error cured any error committed by the court in making the orders and rulings, and in giving the instructions heretofore assigned as error. The record is silent whether any of the items mentioned were taken into consideration by the court in requiring the remittitur (Tr. 29). It would more readily appear that they were not considered, in view of the court's previous action in refusing all relief from the errors complained of, and that the remittitur was required in order to reduce the amount of the verdict under the instructions relating to the alleged damage of $30,000 for Daniel's being pre-

vented from using and occupying the premises in controversy during the time he was kept out of possession (Plff's Bf. 4, item 5).

We do not believe that the court will be influenced by any appeal to decide this writ in such manner as counsel conceive would be popularly approved. May we be permitted to argue that such a suggestion does not strengthen the position of defendant in error upon the merits? Nor is it apparent why a plain disregard of the law, should the court perceive error and yet hold against the writ, would meet with more popular approval than a determination of the questions involved in accordance with the principles upon which all courts are founded, and upon which they rely to protect individuals against an unlawful invasion of rights.

No reason being shown why the alleged damage for failure to secure employment as a marine engineer during the winter of 1907-1908 is recoverable, we turn to the damage claimed for loss of time and expense during the pendency of the suit for specific performance and the appeal thereon. Attention is again directed to the well-established rule, adverted to in our opening brief (p. 15), that evidence of damage suffered through time lost or expenses in-

curred in carrying on litigation is incompetent, and recovery therefor, beyond taxed costs, impossible. Nor is the correctness of this principle questioned in the brief of defendant in error.

THE BOILER.

This item is conceded as manifest error. The suggestion of a remittitur by this court of the amount claimed for the boiler, if coupled with costs, might be of some force; but a remittitur of that amount would give no relief from the many other errors assigned. Daniel testified that he paid $300 for the boiler. (Tr. 33), and the court instructed the jury to find for *the price of the boiler* (Tr. 47). A remittitur for $150, as suggested by counsel, would therefore not be in order in any event.

We sympathize with counsel in their endeavor to extricate themselves from the dilemma in which the court's instruction (Tr. 47) to find *for the price of the boiler* has placed them. Our opening brief (p. 27) admitted no assignment of error thereon, and rested the court's power to regard this instruction, now concededly erroneous, upon the rules of this court.

Counsel say that "the sentence in which the language is found is grammatically incomplete," and

that "the court evidently did not *intend* to tell the jury that plaintiff was entitled to recover the price of the boiler." If the court neglected to make its instruction grammatically complete, and the effect was to misstate the law to the jury, it would appear to constitute error just as much as if the court had erroneously instructed the jury with grammatical accuracy.

Nor, of course, is the court's *intent* material. It is what the court *says*, not what it *intends* to say in instructing the jury, that influences them in their deliberations, and governs their application of the law to the facts. The language of this instruction is plain; but even if it were not, an ambiguous instruction is just as much error as an erroneous instruction. Instructions bearing on the measure of damages must be set forth clearly and intelligibly.

13 Cyc., 235.

Turning to the other instruction relating to the boiler, assigned as error under specification 10 (Tr. 48), it is probably safe to say that the true rule for estimating damages for the loss of the use of the boiler, in a case where such damages are properly recoverable, is not "interest on the money invested" in the boiler during the time its use was prevented, but the *value of the use* during that time. There

being no testimony that Daniel was unable "to rent the boiler or use it in any other way (Tr. 48)," the instruction was without any evidence to support it. Instructions must follow the evidence, and cannot direct a consideration of matters not appearing in proof.

REMOTE, SPECULATIVE AND CONTINGENT DAMAGES.

Adverting more particularly to this aspect of the writ, in its bearing on the admission of incompetent evidence and the erroneous instructions touching recoverable damage and the measure of damages, we call attention to the omission of counsel to cite any authority opposed to the conclusions announced in our opening brief (pp. 17 to 25). A discussion of the evidence is relied on to overcome their force.

Counsel are mistaken in the impression that the instruction assigned as error under specification 11 (Tr. 48-49), is not deemed erroneous in stating the rule for the measure of damages. The direction to allow interest on the *profits* instead of the *purchase price* is believed to constitute reversible error, and authorities have been cited in support (Plff's Bf. 19).

The objection to the testimony on work and values,—hearsay as some of it is, and unsatisfactory

and incompetent as the rest of it is,—is not so much that it did not tend to show that the claims might have been worked by the *drifting process* during the *winters of 1907-8 and 1908-9*, but that it proved the work on which the jury were erroneous instructed to base their estimate of profits, was done by the *hydraulic process* during the *summers of 1910 and 1911*. The results obtained from hydraulicking are no guide to the results that would have been obtained from drifting. Nor is there a particle of evidence that the ground could have been hydraulicked in the summer of 1908.

The seasons during which the hydraulicking was done are admittedly different from the seasons during which it is alleged the drifting was intended to be done. There is no evidence that the rate of wages, cost of supplies, and other expenses necessary in mining would have been the same in the winters of 1907-8 and 1908-9, as they were in the summers of 1910 and 1911; nor that the climatic conditions existing during the winters of 1907-8 and 1908-9 were such as to permit the performance of the same amount of work as was done by hydraulicking during the summers of 1910 and 1911. Unless all the conditions were like, there was no competent evidence to go to the jury on the question of profits.

The fact that the gold was in the ground during the time Daniel was out of possession, is no proof that his lessee would find it at any time during the life of his cause for damages. The record shows that the property, at the time of the execution of the contract between Daniel's assignor and plaintiff in error, was almost wholly undeveloped placer mining ground. The only previous work that had been done upon the claims was by the simple and comparatively inexpensive process of winter drifting (Tr. 32). There was no evidence of values prior to the breach. The value of the claims at the time of the contract, as fixed by the purchase price agreed to be paid, determined the basis of any liability for breach; and this was what was in the minds of the parties at the time the contract was made, and what induced them to enter into the contract relation.

The speculative and contingent character of undeveloped placer claims is well known, and has repeatedly been recognized by the courts. The case is wholly different from that of a well developed quartz mine, where the nature, value, and extent of the ore body, the dip of the vein, the actual cost of extraction, and the other incidents of practical operation, have been definitely determined in advance

of the contract, and are in the minds of the parties when they execute it.

Suppose the Ruhls had agreed to pay plaintiff in error $100, instead of $3,540, for the ground in question before they assigned to Daniel; that Daniel's lessee had extracted gold at the rate of $1,000,000 a year, instead of approximately at the rate of $53,000 a year; that Daniel had been kept out of possession for four years instead of two, and that he had waited to commence the action for damages until four years after the filing of the mandate below. Would Daniel be entitled to damages in the shape of interest on 40% of $4,000,000 during the time he was kept out of possession of the hundred dollar claims? Such speculations as this would seem to illustrate clearly the uncertain and contingent nature of the damages claimed.

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property." (Tr. 47.)

If intelligible, this instruction, assigned as error under specification 8, presupposes a physical impossibility. The defendant in error testified that he was a marine engineer (Tr. p. 31), had offers of

employment as such (Tr. 34), and by reason of his inability to accept a permanent position was prevented from obtaining employment (Tr. 35).

If defendant in error had been employed at his occupation of marine engineer "for the time he was kept out of possession," he could not have been employed in working the mining property in Alaska at any time during the same period. If, *per contra,* he had at any time during the period he was kept out of possession been "profitably employed in working the property," he could not, while so employed, have also been engaged at his occupation of marine engineer.

If defendant in error is entitled to damages for the time he was kept out of possession and could have been profitably employed in working the property, he cannot be awarded damages for loss of earnings at his occupation during any portion of the same period. This would seem incontrovertible at least for such of the time Daniel was out of possession as he could have been profitably employed in working the property.

Following the above instruction, the court directed the jury as follows:

"You may then allow him such *damages* as he

could have earned at his profession or trade, whatever you may call it, less any amount that he may have earned in the meantime, for the time that he was kept out of possession."

This is assigned as error under specification 9. A failure to comprehend its meaning may reasonably be excused. The word "damages," as it occurs in the first line of the instruction (Tr. 55), is clearly erroneous. The plaintiff could earn no *damages* at his profession or trade. The word "meantime" is also ambiguous in connection with the phrase in which it is used; and the language of the whole instruction is much involved.

If the instruction means anything, it assumes that Daniel would have been employed during the entire time he was kept out of possession. This assumption took away from the jury the right to find upon two questions of fact: first, whether Daniel would have been employed at all during the time he was kept out of possession; and, second, if so, for what length of time he would have been so employed. No proof was given or attempted that defendant in error could have been employed during all the time he was kept out of possession. The jury must find the facts from the evidence, and may not assume them.

Triple Damages.

The brief of defendant in error appears not to answer any of the grounds upon which this error is urged (Plff's Bf. 28). We therefore assume that error is conceded.

On the whole record we firmly believe that the judgment of the District Court should be reversed and a new trial granted.

Respectfully submitted,

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